



WOMEN'S LEGAL EDUCATION AND ACTION FUND

344 RUE BLOOR ST. W., SUITE 403, TORONTO

FONDS D'ACTION ET D'ÉDUCATION JURIDIQUES POUR LES FEMMES

CANADA M5S 1W9 416-963-9654

PREGNANCY AND CHILDBIRTH DISCRIMINATION

BRIEF TO

THE CANADIAN HUMAN RIGHTS COMMISSION

CONCERNING PREGNANCY AND CHILDBIRTH DISCRIMINATION

OCTOBER, 1986

BY

Gwen Brodsky, Litigation Director

AND

Leslie Pearl, Research Assistant

With the assistance of LEAF LEGAL COMMITTEE:

Mary Eberts, Daphne Dumont, Beth Symes, Dale Gibson, Lynn Smith

POLICY ON PREGNANCY AND CHILDBIRTH DISCRIMINATION

PRINCIPLES

[Equal opportunity in employment for women has been significantly impaired by discriminatory attitudes which often result in economic penalties and involuntary career interruptions associated with pregnancy, giving birth, and care of the child. Equal opportunity in the provision of goods, services, facilities or accommodation has been similarly affected by these same attitudes.]*

Canada is a signatory to the international Convention On The Elimination Of All Forms Of Discrimination which in Article 11(1)(f) states:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(f) The right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction.

* Square brackets denote portions reproduced from the Commission's draft policy.

Article 11(2) of the same convention states:

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

[The Canadian Human Rights Act (section 3(2)) states, "where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex."] The discrimination occurs because the individual being discriminated against is, has been, or may become, pregnant. [The Act now makes clear, and this policy reflects the position, that such discrimination falls squarely within sex discrimination.]

The Commission recognizes that to give effect to the principle of equal opportunity for women and to Canada's international obligations, traditional concepts based on male norms must be extended to include the realities of women's specific experience. Thus, for example, the concept of "worker" must

include the person who may become pregnant and who, as a result, will be absent from work for some period of time because of that occurrence. The fact that some women will not bear children is irrelevant; women can, and do, suffer discrimination merely by virtue of their reproductive capacity.

The Commission's treatment of pregnancy as a ground of sex discrimination may be analogized to its treatment of disability as a ground in three basic respects:

- i) It is recognized that affected persons may require different treatment from non-affected persons in order to ensure equal opportunity. Thus, treating affected and non-affected persons similarly when different treatment is required will constitute discrimination.
- ii) The fact that a person is a member of the affected class may not be used as a justification for policies that impose a burden or stereotypical notions upon that individual. Thus, policies that bar affected persons from employment opportunities or from services or that hinder them in their enjoyment of such opportunities or services will constitute discrimination.
- iii) Because discrimination against affected persons is based on their difference from non-affected persons, comparisons in treatment may be useful only to the extent that they indicate resulting disadvantages to the affected person(s). The showing of either differ-

ential treatment or an adverse effect can be a ground for a finding of discrimination, and a discriminatory policy or practice may not be justified on the basis that affected persons are not "similarly situated" with non-affected persons.

The Commission's policies regarding discrimination on the basis of pregnancy and childbirth apply in respect of a woman's occupation or employment or intended occupation or employment, advancement or promotion. Without limiting the generality of the foregoing, no employer shall refuse to employ, advance or promote a woman or discriminate against a woman in respect of employment or a condition of employment (including firing, transfer or lay-off) on the basis of pregnancy or of childbirth.

[In the provision of goods, services, facilities or accommodation customarily available to the general public, women affected by pregnancy, childbirth or related medical considerations shall be treated as any other individual selling such goods, services, facilities or accommodation.]

ELABORATION

Pregnancy and Childbirth

As indicated in the principles above, "pregnancy" includes the possibility of pregnancy as well as the actuality of pregnancy and any medical disability resulting from or occurring at the same time as pregnancy. It must be recognized that the scope of discrimination which women experience due to their

childbearing capacity goes beyond the denial of job opportunities and includes such practices as highly invasive questioning in job interviews concerning birth control and childbearing intentions. Concerns regarding the health and safety of the fetus or the expectant mother also fall into this category and area discussed below.

The ground of pregnancy and childbirth will apply as well to women who suffer a late miscarriage, therapeutic abortion or stillbirth, or who give birth and place their child for adoption.

Employment - General

Situations where pregnant women have been refused employment, fired, denied promotion or training, or unwillingly transferred or laid off have been reported in Human Rights cases across the country. In addition to contravening Human Rights legislation, most of these practices are specifically forbidden by the Canada Labour Code.

Temporary Inability to Work

A pregnant employee will require leave from work, certainly at the time of and following childbirth and possibly at any time during the course of the pregnancy. This leave may be required either because the employee is unable to work or because she is put at risk by doing so. The Commission recognizes the sex-specific nature of this leave and distinguishes the time off required by a female related to her pregnancy and childbirth from the time that a parent of either sex may require related

to childcare. (The Commission's position on childcare is found in its Policy on Childcare Leave and Benefits.) As indicated below, under exceptions, such sex-specific leave periods will not be regarded as discriminatory.

Given the recognition that pregnancy and childbirth will entail absence from work, it follows that firing because of absence from work occurring at the time of pregnancy or childbirth will constitute discrimination on the basis of pregnancy. This policy will pertain to medically certifiable absence and will apply whether or not the worker has any statutory or contractual right to leave.

[For all purposes concerning the receipt of benefits and eligibility terms under which coverage is available from any benefits plan, employees temporarily unable to work for reasons related to pregnancy or childbirth, or for reasons unrelated to but occurring at the time of pregnancy or childbirth, shall be treated at least as favourably as any other employee temporarily unable to work for health reasons.] Pregnancy and childbirth shall not be excluded from any benefit plan giving coverage to employees temporarily unable to work.

No employee shall be disadvantaged for taking such leave. In this regard, the Commission would point to Canadian Labour Code provisions entitling employees on leave to be informed of all employment opportunities, reinstated in their former or comparable positions and guaranteed the accumulation of pension, health and disability benefits and seniority.

Health and Safety Hazards

[If a health and safety hazard affects both sexes, a policy directed at women only will be considered discriminatory. If a hazard affects only pregnant women, a policy directed at all women capable of childbearing, but not pregnant, will be considered discriminatory.] The notion of hazards includes obstacles to job performance such as machinery or facilities that may be impractical or painful for a pregnant woman to use. Women who are capable of childbearing or who are pregnant have the right to alternative employment in workplaces where there are hazards to their reproductive capacity or pregnancy. While this right is subject to Bona Fide Occupational Requirements, it is to be noted that BFOR policies include a duty on the employer to "avoid adverse effects by modifying their practices for an individual if this would be reasonable in the particular circumstances." If the employer cannot provide reasonable accommodation the worker shall be entitled to leave with full pay until reasonable accommodation has been arranged or the hazard removed.

In general, once an employer has informed the concerned employee regarding health and safety hazards that might affect her, it is the employee's right to decide what risks she is prepared to take. This reflects the BFOR policy that states "the concern for safety must be balanced against the right of the individual to choose to take a risk which affects only the individual and against a recognition that all employment entails

some risk."

Exceptions

- [(i) In accordance with section 14(f) of the Canadian Human Rights Act, the granting of special leave or benefits to female employees in connection with pregnancy or childbirth or the granting of special leave for the care of children to employees of either sex is not discriminatory.
- (ii) To be considered non-discriminatory, an employer's or purveyor's policy or practice must meet the criteria in the Bona Fide Occupational Requirements/Bona Fide Justifications Policies.] As noted above these criteria include a duty on employers and purveyors to avoid adverse effects by modifying their practices if this would be reasonable in the particular circumstances (formerly referred to as "reasonable accommodation").